IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

ROGER TRENTON DAVIS, *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

From the Supreme Court of Virginia

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully moves this Court for leave to file the petition for writ of certiorari, hereto annexed, under Section 1651 of the Title 28 of the United States Code.

ROGER TRENTON DAVIS

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COMMONWEALTH OF VIRGINIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

Petitioner moves the Supreme Court of the United States for a writ of certiorari on the following grounds:

The petition of Roger T. Davis to the Supreme Court of Virginia for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Wythe County, Virginia on the 20th day of April 1973 in a criminal prosecution by the Commonwealth of Virginia against Rogert T. Davis for a felony was maturely considered and rejected by that Court on the 9th day of November 1973, the effect of which rejection by the Supreme Court of Virginia was to affirm the judgment of the said Circuit Court. It is the judgment of the Supreme Court of Virginia rendered on 9 November 1973 that is sought to be reviewed by this petition.

There have been no further orders respecting a rehearing or an extension of time within which to petition for certiorari. There have been no official or unofficial reports of the opinions of that Court rendered in this case.

STATUTORY PROVISION INVOLVED

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review the judgment in question is 28 United States Code 1257(3). The basis for the jurisdiction of the Supreme Court of the United States in the instant case is founded on substantial federal questions involving the petitioner's Sixth Amendment right under the Constitution of the United States to confrontation and cross-examination of the witnesses against him and his Fourteenth Amendment right under the Constitution of the United States to due process of law. The primary federal questions presented are,

(a) Whether the Court committed prejudicial error by permitting the Commonwealth Attorney to call two witnesses, both of whom were allegedly criminally involved and formally charged in the offense for which the defendant was on trial, as witnesses for the Commonwealth and question them concerning their involvement with the defendant, when the Commonwealth Attorney knew beforehand that they both would refuse to testify, as they in fact did so refuse, by invoking their privilege against self-incrimination; and,

(b) Whether the Court committed prejudicial error in failing to properly instruct the jury after these two witnesses exercised their Fifth Amendment rights.

QUESTIONS PRESENTED FOR REVIEW

(a) Did the Court commit prejudicial error by violating the Petitioner's Sixth Amendment right to confrontation and Fourteenth Amendment right to due process of law in permitting the Commonwealth's Attorney to call Wayne Randolph Howard and Donald Joe Copenhaver, both of whom were allegedly criminally involved and formally charged in the offense for which the defendant was on trial, as witnesses for the Commonwealth and permit questioning them concerning their involvement with the defendant, when the Commonwealth's Attorney knew beforehand that they would refuse to testify by invoking their privilege against self-incrimination?

(b) Did the Court err by violating the Petitioner's Fourteenth Amendment right to due process of law in failing to properly instruct the jury concerning Wayne Randolph Howard's and Donald Joe Copenhaver's exercise of their privilege against self-incrimination during their testimony before the jury?

CONSTITUTIONAL PROVISIONS INVOLVED

(a) Amendment VI—Jury Trial for Crimes, and Procedural Rights

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U. S. Const. Amend. VI

(b) Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protestation; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. Amend. XIV

STATEMENT OF THE CASE

On 19 March 1973, the Petitioner was indicted by a Grand Jury of the Circuit Court of Wythe County, Virginia, for felonious distribution of a Schedule I controlled substance, to-wit: Lysergic Acid Diethylamide. The Petitioner, after arraignment, pleaded not guilty, a motion for change of venue was heard and denied, and trial was set for the 20 April 1973. Prior to trial on that date the Petitioner filed a written motion seeking the Court to not permit the Commonwealth to call Wayne Randolph Howard to the stand as a prosecution witness because the Commonwealth's Attorney had been informed by counsel for Wayne Randolph Howard that Wayne Randolph Howard would assert his Fifth Amendment right to remain silent and that such an assertion "would be prejudicial to the defendant in such a way that no instruction as to his testimony will be able to correct the impressions left in the minds of the jury." (Tr. p. 51) The Court overruled this motion. (Tr. p. 52)

The Petitioner was then tried and convicted of the charge on which he had been indicted and arraigned and was sentenced to five (5) years in the penitentiary. (Tr. p. 203) During the course of the trial, Wayne Randolph Howard and Donald Joe Copenhaver were each called as witnesses, the previous motion made with respect to Howard was reasserted as to both, the motion was again denied, and each in fact asserted their right against self-incrimination and refused to answer certain questions, the effect of which was damaging to the defendant. The defendant, by counsel, moved to set aside the verdict, which motion was overruled (Tr. p. 204), and moved the Court to order a presentence investigation and report, which motion was overruled. (Tr. p. 205) The Court then sentenced the defendant to five (5) years in the State Penitentiary. (Tr. p. 207) Thereupon, the defendant, by counsel, moved the Court for a stay of execution in order to apply for a writ of error to the Supreme Court of Virginia, which motion was granted and the bond of the defendant, together with the surety thereon was continued until the further order of the Court. (Tr. p. 207)

Notice of appeal and assignments of error were duly filed in the Supreme Court of Virginia in accordance with its Rules, and subsequently the petition for a writ of error was duly and timely filed by the Petitioner, Roger T. Davis, with the Supreme Court of Virginia. Upon their consideration whereof, on 9 November 1973, that Court rejected said petition and refused said writ of error and supersedeas, the effect of which was to affirm the judgment of the trial court. From that rejection and refusal, the Petitioner now seeks a writ of certiorari to the Supreme Court of the United

States. On 18 December 1973 the Supreme Court of Virginia entered an order granting a stay of execution and enforcement of said judgment pending the docketing in the Supreme Court of the United States of this petition.

STATEMENT OF FACTS

At the trial itself held on 20 April 1973, it was established that at approximately 3:45 P.M. on 9 February 1973, Roger T. Davis drove his 1967 silver Dodge Charger into the parking lot at Ray's Kingburger, a drive-in hamburger stand in Wytheville, Virginia. (Tr. p. 93) Prior to his arrival two other cars had pulled in and parked on the lot at Ray's, one a 1973 Cadillac belonging to Freddie Neal Jones and containing as passengers, in addition to the driver Jones, Wayne Howard Davis, Wayne Randolph Howard, and Donald Joe Copenhaver (Tr. p. 115), and one a Volkswagon "beatle" driven by Rhonda Neal and containing as a passenger Theresa Lowe. (Tr. p. 116, 172) The Volkswagon was parked next to the Cadillac, with the front end of the Volkswagon facing the rear end of the Cadillac, so that the Cadillac faced the center of the lot while the Volkswagon faced in the opposite direction. (Tr. p. 173) In the shopping center parking lot some 300-400 feet away several police investigators sat in a car observing the scene at Ray's. (Tr. p. 103)

According to Freddie N. Jones, he watched Wayne Randolph Howard leave his car, approach the car of the defendant and give the defendant some money and received in exchange "25 or 30 pills". (Tr. p. 117, 118, 119) He said he saw the pills in Howard's hand from the time he received them until he returned to

the car and handed them to Jones who placed them in a cellophane wrapper, put them in his pocket, and subsequently gave them to police official Guy Farthing. (Tr. p 119, 121, 128) Upon cross examination Jones failed to admit a prior conviction for forgery and then, when closely questioned, admitted being convicted for forgery in 1964. (Tr. p. 125, 126)

Mr. Farthing testified that he was in a car in the Kroger parking lot 300 to 400 yards away from Ray's. He stated that he saw the 1967 silver Dodge Charger enter the lot and saw a person approach the car. (Tr. p. 104, 105) He could not tell what, if anything, went on between that person and the occupants of the Charger. (Tr. p. 106) Farthing testified that he received some pills from Jones, had them tested, and read the lab report without objection. The test revealed that the pills contained LSD. (Tr. p. 97, 98)

Wayne Howard Davis testified that he was a passenger in the front seat of the Jones Cadillac (Tr. p. 136, 137), that he saw the defendant pull into Ray's and stop in front of them. (Tr. p. 138) He then saw Howard leave the Cadillac and approach the defendant's vehicle on the driver's side. (Tr. p. 139) He said he next saw the defendant accept money and hand something to Wayne Randolph Howard. (Tr. p. 140) He said that he constantly observed Wayne Howard as he returned to the Cadillac, except when Howard passed his "side view there and got in". (Tr. p. 142)

He said that he saw Howard give Jones pills in exchange for money once inside the Cadillac. (Tr. p. 143) He further testified that he and Jones were not talking to the girls who were in the Volkswagon but were paying close attention to the defendant and Howard. (Tr. p. 149)

Theresa Lowe, a prosecution witness, testified she was a passenger in the Volkswagon stopped beside the Cadillac and they were at Ray's with the defendant's vehicle. (Tr. p. 172) She testified that she and Rhonda Neal, the driver, were talking with Howard Davis and Jones at great length, that Jones and Davis were flirting with them attempting to make dates and that Jones and Davis did not interrupt their conversation with them the whole time they were there. (Tr. p. 176) She said that Jones and Davis had called her for a date later that night. (Tr. p. 176)

The Commonwealth's Attorney called Wayne Randolph Howard to the stand over written and oral objection of the Defense. (Tr. p. 50, 152) It was pointed out specifically to the Court by the Commonwealth's Attorney that Howard was under juvenile charges for his participation in this alleged transaction with the defendant and the Commonwealth's Attorney and the Court were aware that Howard would assert his privilege against self-incrimination (Tr. p. 152), a fact which the Commonwealth's Attorney has stipulated was known to him before the motion was made or the witness called. The Court denied the motion and allowed Howard to testify before the jury. (Tr. p. 152, 153) Howard admitted being at Ray's Kingburger on 9 February 1973, with Jones and Davis and Copenhaver and admitted remaining there about 15 minutes. (Tr. p. 156) He exercised his Fifth Amendment privilege and refused to answer certain questions which he claimed might tend to incriminate him, first stating, however, that he did not "want to testify against anyone". (Tr. p. 156, 157, 158) Donald Joe Copenhaver, with respect to whom the same motion had been made and overruled, next testified after initially claiming

his privilege under the Fifth Amendment. (Tr. p. 163, 168, 169) He said he was there, but didn't pay much attention as he was talking with "that girl" in the Volkswagon. (Tr. p. 165, 166)

The defendant testified that he was present at Ray's Kingburger (Tr. p. 180), that he talked with Howard (Tr. p. 182), and that he had nothing to do with drugs. (Tr. p. 184) He recalled stopping at Ray's because he saw Wayne Howard and was looking for Howard's brother as he wanted to find him so that they could go to his house for supper and then come back that night. (Tr. p. 181) He testified that he had been to the pool hall that afternoon, that he was on his way home when he just stopped briefly at Ray's to talk with Howard about finding his brother. (Tr. p. 180, 181) He denied distributing any drugs to Wayne Howard or anyone else. (Tr. p. 184)

(7) The federal questions have been timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

The federal questions were raised first at the trial by means of a written motion seeking to prevent Wayne Randolph Howard from taking the stand as a government witness because it was known by the Commonwealth's Attorney that he would claim his Fifth Amendment privilege and refuse to testify and the effect of such refusal before the jury would prejudice the defendant Davis' right to a fair trial. (Tr. p. 50) The Court overruled the motion. The defense at trial renewed this motion immediately prior to the witness Howard taking the stand. (Tr. p. 163) The Court overruled the motion. The Petitioner again raised these questions in his assignments of error and in his

petition for writ of error duly filed with the Supreme Court of Virginia. The Court rejected the petition. The Petitioner now seeks review by this Court of that rejection.

ARGUMENT

I

The Court Committed Prejudicial Error by Violating the Petitioner's Sixth Amendment Right to Confrontation and Fourteenth Amendment Right to Due Process of Law in Permitting the Commonwealth's Attorney To Call Wayne Randolph Howard and Donald Joe Copenhaver, Both of Whom Were Allegedly Criminally Involved and Formally Charged in the Offense for Which the Defendant Was on Trial, as Witnesses for the Commonwealth and Permit Questioning Them Concerning Their Involvement with the Defendant, When the Commonwealth's Attorney Knew Beforehand that They Would Refuse To Testify by Invoking Their Privilege Against Self-Incrimination.

The defendant submits that the Court committed prejudicial error by its improper handling of the witnesses for the Commonwealth, Wayne Randolph Howard and Donald Joe Copenhaver. The Court should not have permitted the Commonwealth's Attorney to call those persons to the witness stand in the presence of the jury when he knew beforehand that they were going to assert in open court their privilege against self-incrimination and refuse to answer questions about the alleged transaction involving the defendant. As the defandant's written motion at trial indicates, allowing such a circumstance to develop in the presence of the jury prejudiced the defendant so severely that no instruction would have removed the prejudice. Certainly, at a minimum the Court on its own initiative should have instructed the jury concerning how they were to consider the exercise by these witnesses of their privilege against self-incrimination, rather than

ignoring the situation entirely and failing to give the jury any instruction as was done in this case.

Prior to trial on 20 April 1973, in chambers the defendant, by counsel, moved the Court,

> "To not permit the Commonwealth of Virginia to place Wayne Randolph Howard, a juvenile, on the stand in the trial in the above styled case nor to allow him to tesify in this case as to any manner for the following reasons, to-wit: 1) The Commonwealth Attorney for Wythe County, Virginia, has been informed that if Wayne Randolph Howard, a juvenile, were to testify in this case he will assert his right to invoke his rights under the Fifth Amendment of the Constitution of the United States and is likewise protected by the Constitution of the State of Virginia. 2) That any testimony of the nature contained in Paragraph 1 of this motion would be prejudicial to the defendant in such a way that no instruction as to this testimony will be able to correct the impression left in the minds of the jury. (Tr. p. 50-51)

The Commonwealth's Attorney responded to this motion by stating that he knew Howard would invoke his Fifth Amendment rights but that he was calling him so as to avoid any inference unfavorable to the Commonwealth from its failure to call these witnesses. (Tr. p. 51, 52)

The Court overruled the motion.

Then at a later point during the presentation of the Commonwealth's case, and prior to calling Wayne Randolph Howard as a witness the defendant renewed his motion previously made concerning Howard's testifying, and also added the name of Donald Joe Copen-

haver to the motion. (Tr. p. 151, 152) The basis for the defendant's motion was the same as previously given and the judge overruled the motion again. (Tr. p. 152)

The jury was then brought in and Wayne Randolph Howard was sworn as a witness for the Commonwealth. Preliminary questioning established that Howard knew Mr. Freddie Jones, the main prosecution witness, and was in his car with Donald Joseph Copenhaver and Howard Davis on 9 February at Ray's Kingburger, and that while they were parked there a Volkswagon containing Theresa Lowe and another girl named Rhonda drove up and that conversation took place between the people in Jones' car and the girls. Thereupon, the Commonwealth's Attorney asked Howard:

"Q. During the course of that conversation did a gray Dodge Charger drive up?
A. Do I have to answer that question?

THE COURT: Speak to your attorney.
A. I won't testify to this, Your Honor.

THE COURT: I beg your pardon.

MR. HOWARD: *I don't want to testify against anyone.* (Emphasis added).

THE COURT: You don't want to answer that question on the ground that it may incriminate you?

MR. HOWARD: Yes, sir.

THE COURT: All right, go on to another question.

Q. Do you know of anyone else—how long did you all remain at Ray's Kingburger that particular date?
A. About 15 minutes.

Q. Where did you go after you left there?
A. Went down Main Street.

Q. Where were you let out that day?
A. At the bus station.

Q. Did anyone else get out with you?
A. Joseph Copenhaver.

Q. Mr. Howard Davis and Freddie Jones remained in the car?
A. Yes, sir.

Q. Do you know approximately how long after you had been at Ray's that they let you out at the bus station?
A. No, sir.

Q. Did you get out of the car while it was parked at Ray's Kingburger?
A. ——— (inaudible).

MR. WINDER: I am sorry, Your Honor, I must be going deaf. I can't hear you.

MR. BOYD: You'll have to speak up a little bit.

MR. WINDER: Let these ladies and gentlemen hear what you have to say, please.

THE COURT: Now what did you say?

A. *I'm not going to testify against that.* (Emphasis added).

THE COURT: You don't want to answer that question on the ground that it may incriminate you?

MR. HOWARD: Yes, sir.

THE COURT: All right.

Q. Did you have any money on you that particular date?
A. No, sir.

Q. You did not?
A. No, sir.

Q. Did you see Roger Davis up there on that particular date?
A. I can't answer that question.

THE COURT: I'm sorry I didn't catch that.

MR. HOWARD: I'm not going to answer that one either.

THE COURT: You don't wish to answer that question?

MR. HOWARD: Yes, sir.

THE COURT: On the same constitutional ground. All right.

Q. Did you see anyone else that you knew on that date while up at Ray's Kingburger other than the occupants of the Volkswagen and the Jones Cadillac?
A. ——— (inaudible).

Q. Who did you see?
A. I'm not going to answer that. It might incriminate me." (Tr. p. 156-158)

On cross-examination no other matters were testified to by the witness Howard. Copenhaver made a broad claim of privilege when he first assumed the stand and then refused to answer two questions which were asked by the defendant's counsel. They related to Copenhaver's witnessing a transaction between Howard and Jones at a later time and place (Tr. p. 168), and to whether anyone gave Howard any money. (Tr. p. 169)

No instruction was given by the Court to the jury at any time either before, during, or after the testimony of Howard or Copenhaver, or prior to the jury retiring to deliberate, concerning the jury's duty not to consider the claim of Howard and Copenhaver of the privilege against self-incrimination as any evidence against the defendant.

The impact of the Howard testimony in particular, is clear. Howard was the person who, according to the Commonwealth's theory of the case, received five pills of LSD from Davis by walking from the Jones' car to the gray Charger driven by Davis, conversing with Davis who was in the driver's seat of the car, and giving Davis money in exchange for the pills, then carrying the pills straight back to Jones who was still in his own car. Howard, before the jury, refused to answer whether a gray Dodge Charger drove up, whether he got out of the Jones' car while the Charger was parked at Ray's Kingburger, whether he saw Roger Davis at Ray's Kingburger that day, whether he saw anyone else he knew at Ray's Kingburger that day and who was it he saw, and his assertion that he did so because he didn't "want to testify against anyone" was before the jury.

His refusal to answer these questions could only have led the jury to conclude that his answers would tend to incriminate him in the alleged purchase or distribution of LSD with the defendant, Roger Davis. The jury was bound to conclude that if that were not true, if Howard didn't buy some LSD at Ray's Kingburger on 9 February 1973, from Roger Davis, he would have answered these questions. That had to be the sole impression left in the minds of the jury after Howard finished his testimony and the person "against" whom he did not want to testify had to be Roger Davis.

There are no Virginia cases on point with regard to the issue of a prosecutor calling as his witness, a witness who the prosecutor knows beforehand will claim his privilege against self-incrimination. Cases in other jurisdictions and the Supreme Court of the

United States hold such conduct by the prosecution requires reversal, because it operates unfairly to prejudice the defendant in the eyes of the jury and violates the defendant's Sixth Amendment rights to confrontation and cross-examination.

Perhaps the first definitive opinion on this issue is found in *United States* v. *Maloney*, 262 F.2d 535 (2d Cir. 1959), and was written by Judge Learned Hand. In *Maloney*, five persons conspired to blackmail a physician who performed an illegal abortion. One of these persons, a man named Parker, was called by the prosecution and gave testimony outlining the plan whereby Maloney was to pose as an FBI agent for the purpose of pressuring the physician into paying them $10,000. Maloney had a set of FBI "credentials." The prosecutor called the other three co-conspirators, Parkhurst, Mascali and Silin. The prosecutor asked Parkhurst whether she had "ever put anything into that box at the request of Robert William Maloney," referring to the keeping of the FBI "credentials" in her safe deposit box. She refused to answer, claiming her privilege against self-incrimination. Mascali, when called as a witness, was asked whether "any arrangements were made whatsoever with respect to your having an abortion." She refused to answer, claiming her privilege against self-incrimination. Silin, when asked whether he had procured Maloney's "credentials," also refused to answer claiming the privilege against self-incrimination.

The Court in its opinion discussed the issue, saying:

> "Such refusals have been uniformly held not to be a permissible basis for inferring what would have been the answer, although logically they are very persuasive. How to deal with them is another

matter, not easy to decide; but it is clear, not only that the presumed answer has not the sanction of an oath, but—what is even more important—that the accused cannot cross-examine. If they once do get before the jury, there arises, as we have said, a strong probability that they will be taken as evidentiary.

"The prosecution replies that, if it is forbidden to put the question, the jury may well assume that the witness, if called, would testify for the accused, and that this inference too would be unfair. We must confess that the situation is one in which either alternative results in prejudice to one side or the other; and it is impossible, so far as we can see, to lay down any general rule that will cover all instances. In the case at bar the prosecution knew that Parkhurst and Mascali would refuse to answer, and it seems to us that the interest of the accused should prevail over that of the prosecution, and that the judgment should not stand, for the questions touched vital elements of the charge. On the other hand, we agree that in such situations, if the accused at any stage of the trial should argue that the failure to call such a witness indicated that he would not support the charge, the prosecution should be free to disclose the fact that it had reason to suppose that the witness would refuse."

The Court went on to say, concerning the lack of cautionary instruction,

"We rest our decision therefore upon the fact that the accredited, ritual was not followed; and surely, if it is ever to be taken seriously, there could hardly be an occasion when it was more necessary, especially as to the refusals of Parkhurst and Silin whose corroboration of Parker touched upon the only possible source of jurisdiction over the subject matter: the use of the F.B.I. 'credentials'."

In the instant case, the defendant clearly did not argue that the failure to call Mr. Howard or Mr. Copenhaver indicated that they "would not support the charge." The Commonwealth's Attorney, on his own initiative, not in response to any effort by the defendant to argue the theory of unfavorable inference from the failure to call existing witnesses, called Mr. Howard and Mr. Copenhaver. Thus, under the guidelines propounded in *Maloney,* the Commonwealth's Attorney was acting improperly by calling Mr. Howard and Mr. Copenhaver knowing in advance they would assert before the jury the right to remain silent on the grounds of self-incrimination. And, as in *Maloney,* no instruction, or "accredited ritual," was given to attempt to purge the effect of the testimony before the jury.

In 1963 the Supreme Court of the United States addressed the issue in *Namet* v. *United States,* 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed. 2d 278 (1963). In *Namet* the prosecutor was permitted to ask two witnesses incriminating questions concerning their relationship with the defendant, knowing beforehand that the witnesses would invoke their privileges against self-incrimination. A total of only four questions during a lengthy period of examination were not answered as a result of the privilege against self-incrimination being exercised. No objection nor requested instructions were made by the defendant's counsel. The Lower Court did instruct the jury concerning the refusals, without objection by the defendant's counsel.

The Supreme Court discusses the Lower Court decision in this area, saying:

> "None of the several decisions dealing with this question suggests that reversible error is invari-

ably committed whenever a witness claims his privilege not to answer. Rather, the lower courts have looked to the surrounding circumstances in each case, focusing primarily on two factors, each of which suggests a distinct ground of error. First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. This seems to have been one of the principal reasons underlying the finding of reversible error in *United States* v. *Maloney*, supra. In that case, the prosecution admitted knowing that two of its key witnesses could validly invoke the privilege against self-incrimination and intended to do so. The prosecutor nevertheless called and questioned them. The Court also found that the Government's closing argument attempted to make use of the adverse inferences from their refusals to testify.

"A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant. This theory seems also to have been present to some extent in the *Maloney* decision, where the court noted that the challenged inferences were the only corroboration for dubious and interested testimony by the Government's chief witness. 262 F.2d 536-537. On the other hand, courts have failed to find reversible error when such episodes were 'no more than minor lapses through a long trial'."

The Court found in *Namet* that the record did not support any inference of prosecutorial misconduct, since initially the prosecutor did not believe the wit-

nesses had a privilege against self-incrimination because the witnesses had previously pleaded guilty and, importantly, they both possessed nonprivileged information that was useful to the Government's case. The Court held that these few lapses when viewed in the context of the whole trial did not amount to planned attempts by the Government "to make capital out of witnesses' refusals to testify". The Court went on to say that the few invocations of privilege were of minor significance, distinguishing them from the *Maloney* case,

> "Thus the present case is not one like *Maloney, in which a witness' refusal to testify is the only source, or even the chief source, of the inference that the witness engaged in criminal activity with the defendant.* In this case the few claims of testimonial privilege were at most *cumulative support for an inference already well established by the non-privileged portion of the witness' testimony.*"

In *Douglas* v. *State of Alabama,* 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965), the Supreme Court of the United States again addressed this question. In *Douglas* an accomplice, having previously pleaded guilty, was called to the stand by the prosecution, but he refused to answer any questions. The prosecution then produced a document said to be the witness' confession, and, reading parts of it, asked the witness if he made that statement. Each time the witness refused to answer. The Court held that this procedure created a situation where the jury might improperly infer both that the statements had been made and that they were true and the defendant was deprived of the right to

cross-examine. The Court in *Douglas* distinguished *Namet* as follows:

> "This case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse. The alleged statements clearly bore on a fundamental part of the State's case against petitioner. The circumstances are therefore such that "inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant."

A recent Federal case, *United States* v. *King*, 461 F.2d 53 (8th Cir. 1972), applies the guidelines forged in *Maloney*, *Namet* and *Douglas* to a situation much like the case at bar where the Government called two witnesses, knowing that both would assert their privilege against self-incrimination. The defendant claimed that the only purpose in calling them was to arouse a prejudicial atmosphere, and the Court agreed. In *King*, counsel for the witnesses advised the prosecutor beforehand that the witnesses would claim the privilege against self-incrimination, yet the Government called them and questioned them in front of the jury.

The Court said:

> "No useful government purpose was served by calling these witnesses other than in forcing them to take the privilege in a manner obviously prejudicial to the defendant. As Professor Wigmore has said: "The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." 8 Wigmore on Evidence, § 2272, p. 426 (McNaughton rev. 1961). In the instant case when the witnesses refused to answer whether they were

> with King on the night of the bombing, the obvious direct effect was, "Yes, I was and if I would tell you about it it would incriminate me." This is as strong as pointing a finger at King and saying he did it. Yet the defendant King is helpless to cross-examine. Each case must be judged on its own facts but there can be little doubt of the prejudicial atmosphere created here."

Significantly, in *King* the trial judge submitted a cautionary instruction to the jury advising them not to infer the defendant's guilt from the witnesses' refusal, yet the Court holds this to be insufficient protection for an error this prejudicial:

> "We do not consider this sufficient protection to overcome the prejudicial harm created by the government in purposefully injecting into the trial this problem in the first place."

This case is virtually on all fours with the instant case. The witnesses in *King* refused to answer whether they were with King on the night of the bombing. Mr. Howard was asked if he was with Roger Davis on the day in question. Both refused to answer, and the obvious direct effect was the same, "Yes, I was and if I would tell you about it, it would incriminate me." Just as the witness in *King* pointed his finger at Mr. King as he sat helpless to do anything about it, so also did Howard point his finger at the defendant who was equally as helpless and unfairly prejudiced by this scenario as Mr. King. Worse, when Howard was permitted to say that he did not want to testify against anyone and the Court, of its own volition translated this into the assertion of the Fifth Amendment privilege, what was a pointing finger in *King* became a hand closed around the neck of the defendant, who was

denied the right of cross-examination as a tool to try to pry it loose.

There have also been numerous state court decisions on this issue, notably *People* v. *Pollock*, 21 N.Y. 2d 206, 287 N.Y.S. 2d 49 (1967); *State* v. *Cullen*, 103 N.J. Super 360, 247 A.2d 346 (1968); *Richardson* v. *State*, 246 So. 2d 771 (1971) and *DeGesuaido* v. *People*, 364 P.2d 374, 86 A.L.R. 1435 (1961). The Courts in these cases have all condemned the practice of the prosecutor calling a witness to the stand *knowing* in advance that the witness was going to invoke the privilege against self-incrimination. They cite the effect on the jury of the refusal to answer and the unfavorable inference drawn therefrom against the defendant as being primary considerations for reversal.

Two main factors prompt relief—first, prosecutorial misconduct and second, addition of critical weight. The first is defined as, "when the prosecution makes a conscious and flagrant attempt to build its case out of inferences arising from the use of the testimonial privilege," and the second occurs when the inferences add "critical weight to the prosecution's case in a form not subject to cross-examination", thus unfairly prejudicing the defendant.

Both factors and more are present in the case at bar. The prosecutor knew Howard would refuse to answer, claiming the Fifth Amendment. (Tr. p. 50, 51, and stip.) He continued to ask questions implying connection with the defendant in illegal activity. His statement concerning why he felt he must call Howard (Tr. p. 50, 51) was, we believe, appropriately dealt with by Judge Hand in *Maloney*, where it was stated that the prosecution could disclose the anticipated re-

fusal if the defense attempted to argue that failure to call any witnesses created an inference of unfavorable testimony.

The defendant contends in this appeal that indeed a "conscious and flagrant attempt was made by the prosecutor to use these influences created by Howard's refusals to testify. The prosecutor knew Howard would refuse to testify, yet he openly, and in defiance of the defendant's written motion claiming prejudice, called and extensively questioned both Howard and Copenhaver before the jury, thus unfairly prejudicing the defendant. Moreover, the Court allowed this to happen, casually ignoring what was taking place and leaving the jury on their own as to how to regard it. This was plainly error.

The critical weight was added to the prosecution's case by Howard's refusals to testify hardly can be disputed. The questions asked Howard were designed to infer that the alleged sale from Roger Davis to Wayne Howard took place. The fact that Howard refused to answer these questions only served to confirm the prosecution's theory that Howard did, in fact, participate in the alleged sale receiving the LSD pills from Roger Davis at the time and place in question.

Indeed, Howard's refusals went beyond the stage of inference to point-blank accusation. When attempting to invoke his privilege against self-incrimination, Howard said he did not "want to testify *against* anyone." Later, when again refusing to testify he said, "I'm not going to testify against that." (Tr. p. 156-158) There was only one person against whom he would be testifying at that trial—the defendant, Roger Davis. Wayne

Howard did not merely infer the defendant's guilt, he affirmatively stated that he would, if forced to testify, be testifying *against* Roger Davis. He would therefore incriminate not only himself, but also the defendant and he didn't want to do that. That was what he *said* in front of the jury, all of which was not subject to cross-examination by the defense and all of which was unfairly prejudicial to the defendant.

The questions propounded to Wayne Howard and his answers when asserting his claim to the privilege against self-incrimination were of no small or incidental significant in this trial. They were not the result of a "minor lapse" in the prosecutor's judgment. Nor were they an isolated instance during the course of a lengthly examination of a witness who had other relevant and corroborating testimony to give. Rather Wayne Howard testified to nothing of any probative value except, as a practical matter, when he asserted his privilege against self-incrimination. The remainder of his testimony was found elsewhere in the record and, importantly, were facts not in issue. The only purpose for calling Howard was to elicit in the presence of the jury his refusals to answer on the grounds that his answers might tend to incriminate him. But, even something better than that came out for the prosecution when Howard said he didn't "watn to testify *against* anyone." The language of Howard's refusal left little for the jury to infer. It was all but spelled out for them, and it was immune from the Constitutionally guaranteed test of cross-examination.

Howard's refusals lent instant credibility to the prosecution's case. They provided the critical weight to a case which was, in essence, the defendant's word against the word of two informers, Freddie Jones and

his friend, Howard Davis. Before Howard's prejudicial appearance on the witness stand, it was a close case hinged on witness credibility.

The informant Jones was an admitted forger who tried to conceal that fact from the jury on cross-examination. (Tr. p. 125) Jones and Howard Davis, more importantly, were in a difficult physical position to observe anything that took place between Howard and the defendant. Both Jones and Howard Davis were sitting in Jones' car looking through the windshield of their car as Howard stood next to the defendant's car at the window on the driver's side. Yet Jones and Davis allegedly observed the defendant give Howard a number of small pills containing LSD and receive money in return. This dubious assertion on their part was made more difficult to believe in light of the testimony of an independent witness, Theresa Lowe, one of the girls in the Volkswagen parked next to Jones' car, that Jones and Davis were flirting and talking with the girls rather than closely watching anything that may have been taking place near the defendant's car. These two girls, of all the witnesses in the case, were the most unbiased since they had no interest whatsoever in this proceeding but were truly independent. Such evidence, in the face of the defendant's denial, did not place the case in a posture of overwhelming strength in favor of conviction. A jury could have very easily entertained a reasonable doubt as to the defendant's guilt. But, with Howard's assertion of the privilege against self-incrimination, a close case became one which kept the jury out only seventeen minutes. Demeanor, inconsistencies, witness credibility, probabilities and doubts were no longer important, for Howard's refusals to answer for fear

of incriminating himself and testifying "against anyone" had added that critical weight to the prosecution's case. A substantial, but not overwhelming case, became a compelling one. The inferences and accusations created by Howard's refusals were more important to the prosecution than any other testimony in the case. And plainly, the prosecution intentionally sought to achieve that effect, for no other purpose can be divined for having Howard take the stand and the persistent questioning which was conducted. It is clear that the Commonwealth's Attorney improperly used Howard's refusals to corroborate the weak testimony of the informants Jones and Davis and to imply the defendant's guilt. And, significantly, the Commonwealth's Attorney did so knowingly and intentionally. It was not a minor lapse or small occurrence. Indeed, it was the high point in an otherwise unremarkable criminal trial.

The authorities are clear; such prosecutorial misconduct is highly improper and requires reversal. The inferences and accusations created by this situation prejudiced the defendant's case and deprived him of his Constitutional right to confrontation and cross-examination and his constitutional right to a fair trial under due process of law. For the reasons set forth above, the defendant submits that prejudicial error occurred and reversal of the conviction of the defendant is required.

II

The Court Erred by Violating the Petitioner's Fourteenth Amendment Right To Due Process of Law in Failing To Properly Instruct the Jury Concerning Wayne Randolph Howard's and Donald Joe Copenhaver's Exercise of Their Privilege Against Self-Incrimination During Their Testimony Before the Jury.

The defendant submits that the Court committed prejudicial error by not properly instructing the jury concerning Wayne Randolph Howard's and Donald Joe Copenhaver's refusal to answer questions before the jury on the grounds that their answers might tend to incriminate them.

In the instant case, at no time did the Court instruct the jury concerning how they were to regard these refusals to answer by Hower and Copenhaver. No guidance whatsoever was given. The attorneys for both Howard and Copenhaver were present in Court next to their clients and identified as such, and Howard and Copenhaver both refused to answer questions on the grounds that their answers might tend to incriminate them. The questions which they refused to answer dealt exclusively with the alleged transaction with the defendant, for which he was then on trial. The only reasonable inference from their refusals was that the witnesses Howard and Copenhaver had been involved in an illegal transaction with the defendant. Yet the Court did not ever instruct or advise the jury concerning this point. The defendant claims that this error by the Court violated the defendant's Fourteenth Amendment right to due process of law, deprived him of a fair trial, and calls for a reversal of his conviction.

It is necessary to look again at the *Maloney* and *King* cases previously discussed in the preceding question,

since these cases deal with the problem of instruction. The Court in *Maloney* reversed because no cautionary instruction was given to the jury, even though the defendant did not request one, holding that the occasion for prejudice was so great that if such an instruction should ever be taken seriously it would be in this situation.

In *King,* the Court did instruct the jury to the effect that a witness invoking the Fifth Amendment privilege against self-incrimination should not prejudice the defendant, nor give rise to any inference of his guilt. The case was reversed and remanded, the Court holding that such an instruction was "a ritual," and insufficient to cure such prejudicial error.

In *Small* v. *Robbins,* 258 F. Supp. 621 (1966), the Court held that the prejudice was so great that no instruction could purge the effect had on the jury. The facts in that case were similar to the one in the case at bar. The witness was asked numerous questions bearing on the defendant's criminal involvement to which he declined to answer. The Trial Court later instructed the jury not to draw any inference from this situation. The Court on appeal held that no instruction could cure the error since the prejudice was so great.

In the instant case, as in the *King* and *Small* cases, the defendant submits that the prejudice was so great as to be incapable of being cured by a cautionary instruction. Even *Maloney* admits that it requires a bit of "mental gymnastics" on the part of the jury when they see and hear certain things to then disregard them on the command of the judge. Moreover, the cases following *Maloney* have grounded their reversals not

so much on faulty instructions, but rather, primarily on the fact of either prosecutorial misconduct or prejudicial inferences to the jury by reason of the refusals to answer. E.g., *United States* v. *Namet, supra.* Yet, in all these cases there seemed to be at least an awareness of the possible prejudice to the defendant as a result of the claimed privilege by the witnesses, and in most of these cases, the Court has at least recognized the problem of prejudice and has itself attempted to instruct in an effort to cure the error. In the case at bar, the entire situation cried out for some guiding language to the jury from the judge, yet it was treated instead with complete disregard. The trial judge simply ignored the task of advising the jury about how they were to consider these claims of privilege and left them totally on their own. Certainly, the ends of justice and the interests of fundamental fairness and Constitutional due process demand at least an effort from the Court to ensure a fair trial for the defendant. In this case, the Court ran roughshod over the rights of the defendant on this issue when it should have been attempting to protect them. In this situation, the Court obviously had a duty to its own motion to ensure that no prejudice to the defendant occurred. It failed to discharge this duty and the defendant was prejudiced thereby. The opportunity for abuse was present. The jury could well have misused the claims of privilege, particularly absent some instruction from the Court as to how this testimony should be considered, if at all. That the defendant was convicted is witness to the fact that such a possibility was likely a reality. The defendant moved to prevent this prejudicial situation from occurring. He raised the issue for the Court before a single witness had been called and

again before both Howard and Copenhaver testified. In his written motion he specifically addressed the prejudice which would arise and the difficulty with the cautionary instruction which he obviously anticipated would be given by the Court to the jury on this issue. That instruction never came, nor did any other word of instruction concerning prejudice to the defendant or inference to be drawn from the witnesses' refusal to testify. The failure of the Court to offer such an instruction constituted a denial of constitutional due process of law to the defendant and devastatingly operated to his prejudice.

In this case, the prosecutorial misconduct, the prejudice from the inferences of the refusals themselves, and the lack of any proper cautionary instructions to the jury, singly or in concert, constitute reversible error. The defendant submits that for these reasons the Court committed prejudicial error by not properly instructing the jury on the refusal to answer on the grounds of the privilege against self-incrimination exercised before the jury by Commonwealth witnesses Howard and Copenhaver, and that accordingly his conviction should be reversed.

CONCLUSION

The trial court erred in permitting the Commonwealth's Attorney to call the witness Howard and the witness Copenhaver, both of whom were allegedly criminally involved and formally charged in the offense for which the defendant was on trial, as witnesses for the Commonwealth and question them concerning their involvement with the defendant when the Commonwealth's Attorney knew beforehand that both witnesses would refuse to testify by invoking their privilege

against self-incrimination. The trial court also erred by not instructing the jury properly concerning the exercise of the privilege against self-incrimination before the jury by witnesses Howard and Copenhaver. The appellant court erred by not granting the defendant's petition for writ of error. These errors operated to deprive the petitioner, Roger Trenton Davis, of his constitutional rights under the Sixth Amendment regarding confrontation and cross-examination of witnesses against him and his Fourteenth Amendment rights under the United States Constitution regarding his right to due process of law.

Therefore, the petitioner, Roger Trenton Davis, prays this court to grant this petition for a writ of certiorari and upon review to reverse the judgment previously entered against him.

ROGER TRENTON DAVIS

By JOHN R. PROSSER
Counsel

JOHN R. PROSSER and
THOMAS V. MONAHAN
HALL, MONAHAN, ENGLE, MAHAN & MITCHELL
9 East Boscawen Street
Winchester, Virginia 22601
Counsel for Petitioner

APPENDIX

APPENDIX

VIRGINIA: In the Clerk's Office of the Circuit Court for the County of Wythe on the 20th day of April, 1973.

PRESENT: Honorable R. William Arthur, Judge.

VIRGINIA:

IN THE CIRCUIT COURT OF WYTHE COUNTY
COMMONWEALTH OF VIRGINIA

v.

ROGER TRENTON DAVIS

Date of Birth: July 10, 1945

Order

Distribution of
Schedule I Controlled Substance

This day came again the Attorney for the Commonwealth, and Roger Trenton Davis, who stands indicted of a felony, to-wit, felonious distribution of a Schedule I controlled substance, to-wit, Lysergic acid Diethylamide, appeared according to the condition of his recognizance, and came also William T. Winder, his attorney.

It is ORDERED that all of the evidence and other incidents of trial be reported verbatim by Elinor E. Williams, Court Reporter, who was sworn so to do.

Whereupon, the accused was arraigned and after private consultation with and being advised by his said attorney, pleaded not guilty to the indictment, which plea was tendered by the accused in person.

The Court then impanelled twenty qualified jurors, free from exception for the trial of the defendant, in the manner provided by law. Whereupon the attorney for the Commonwealth and the attorney for the defendant exercised their rights to strike names from the panel, as provided by law, and the remaining twelve jurors, constituting the jury for the trial of the defendant, were duly sworn.

After opening statements, the court and jury heard the evidence presented by the Commonwealth and the defendant, and after hearing the evidence, the instructions of the court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open court, reading:

> "We, the jury, find the defendant, Roger Trenton Davis, guilty of the felonious distribution of a Schedule I controlled substance as charged in the indictment and fix his punishment at five (5) years.
>
> (Signed) "Woodrow Akers
> Foreman

The defendant, by counsel, then moved the court to set aside the verdict, which motion was overruled and exception was noted.

The defendant, by counsel, moved the court for a presentence investigation and report, which motion was overruled and exception was noted.

The Court then inquired of the defendant whether he desired to make a statement or to advance any reason why judgment should not be pronounced against him. The defendant having declined so to do, the Court finds the defendant guilty of the felonious distribution of a Schedule I controlled substance, to-wit, Lysergic acid Diethylamide, as charged in the indictment, and sentences the defendant to confinement in the penitentiary of the Commonwealth for a term of five (5) years; and it is adjudged that the Commonwealth recover of the defendant the costs of this proceeding.

Thereupon, the defendant, by counsel, moved for a stay of execution of said sentence in order to apply for a writ of error, which motion was granted, and the bond of the defendant, together with the surety thereon, is continued in effect until further order of this court.

The Court certifies that at all times during the trial of this case the defendant was personally present and his

attorney was likewise personally present and capably represented the defendant.

It is further ORDERED that Elinor E. Williams, Court Reporter, be allowed a fee of $35.00 for services rendered herein, to be certified to the State Comptroller for payment.

Enter this Order this 20th day
of April, 1973.

/s/ R. WILLIAM ARTHUR, Judge

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON TUESDAY THE 5TH DAY OF JUNE, 1973.

ROGER TRENTON DAVIS, *Plaintiff in error,*

against

COMMONWEALTH OF VIRGINIA, *Defendant in error.*

FROM THE CIRCUIT COURT OF WYTHE COUNTY

On May 23, 1973, came Roger Trenton Davis, by counsel, and filed a motion praying that this court grant an extension of time to perfect an appeal from a judgment rendered against him on April 20, 1973, by the Circuit Court of Wythe County.

On consideration whereof, it is ordered that the time to file with the clerk of the said court supplemental assignments of error be, and the same is hereby, extended until July 3, 1973.

Which is ordered to be certified to the said circuit court.

A Copy,

Teste:

/s/ H. G. TURNER
Clerk

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON FRIDAY THE 9TH DAY OF NOVEMBER, 1973.

The petition of Roger Trenton Davis for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Wythe County on the 20th day of April, 1973, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy:

Teste:

HOWARD G. TURNER, *Clerk*

By: /s/ ALLEN L. LUCY
Deputy Clerk

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON TUESDAY THE 18TH DAY OF DECEMBER, 1973.

Record No. 730680

ROGER T. DAVIS, *Plaintiff in error,*

against

COMMONWEALTH OF VIRGINIA, *Defendant in error.*

Order Staying Execution of Judgment

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment rendered herein on November 9, 1973, in order

that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case rendered on November 9, 1973, be, and the same is hereby, stayed, until the 7th day of February, 1974, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

And it appearing to the court that the original manuscript record, transcript of testimony and exhibits were returned to the Circuit Court of Wythe County on November 14, 1973, which court is now possessed of the record, the motion praying that the clerk of this court prepare and transmit the original record in this case to the Supreme Court of the United States is denied.

A Copy:

Teste:

/s/ H. G. Turner
Clerk

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1181

ROGER TRENTON DAVIS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

ANDREW P. MILLER
Attorney General

WILBURN C. DIBLING, JR.
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1181

ROGER TRENTON DAVIS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

OPINION BELOW

There is no reported opinion of the Supreme Court of Virginia. The Order rejecting the Petition for a Writ of Error is set forth in the Petition for a Writ of Certiorari in the Appendix, p. 4a.

JURISDICTION

Petitioner asserts that jurisdiction is founded upon 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Petitioner was convicted by the Circuit Court of Wythe County, Virginia, on March 19, 1973, for felonious distri-

bution of a Schedule I controlled substance, lysergic acid diethylamide, and sentenced to imprisonment for five years in the State Penitentiary. Petitioner moved the Court for a stay of execution in order to apply for a Writ of Error to the Supreme Court of Virginia, and this motion was granted. On November 9, 1973, the Supreme Court of Virginia rejected and refused the Petition for a Writ of Error, the effect of which was to affirm the judgment of the trial court. From this judgment, the petitioner now seeks a Writ of Certiorari from the Supreme Court of the United States. On December 18, 1973, the Supreme Court of Virginia entered an order granting a stay of execution and enforcement of said judgment pending the docketing in the Supreme Court of the United States of this petition.

For purposes of clarity, the petitioner and respondent will hereinafter be referred to as the defendant and the Commonwealth, respectively. All page references will be to the transcript of the proceeding in the Circuit Court of Wythe County and will be designated "Tr."

STATEMENT OF FACTS

At approximately 3:45 p.m. on February 9, 1973, the defendant drove his gray Dodge Charger vehicle into the parking lot of Ray's Kingburger, a drive-in hamburger stand in Wytheville, Virginia (Tr. 93). Already on the scene were two other vehicles, a 1973 Cadillac belonging to Freddie N. Jones and containing as passengers, Howard Wayne Davis, Wayne Randolph Howard, and Donald Joe Copenhaver (Tr. 115), and a Volkswagen driven by Rhonda Neal and containing as a passenger, Teresa Lowe (Tr. 116, 172). In a shopping center parking lot some 300-400 feet away, several police investigators sat in a vehicle observing the scene (Tr. 103).

Freddie N. Jones testified that he watched Wayne Randolph Howard leave his vehicle, approach the vehicle of the defendant, and that the defendant handed Wayne Howard some pills in return for an unspecified sum of money (Tr. 117). Jones also testified that he saw the pills in Wayne Howard's hand from the time he received them from the defendant until Howard returned to the car and transferred five of the pills to Jones in exchange for $10.00. Jones placed the pills in cellophane wrapper and subsequently gave them to Investigator Farthing (Tr. 119, 120, 121, 128). On cross-examination, Jones admitted having been convicted of passing worthless checks (Tr. 125, 126).

Lab analysis revealed that the pills received by Investigator Farthing from Jones contained LSD (Tr. 97, 98).

Howard Wayne Davis testified that he was a passenger in the front seat of the Jones' Cadillac (Tr. 136, 137) and that he saw the defendant pull into Ray's and stop in front of them. He further testified that he saw Wayne R. Howard leave the Cadillac and approach the defendant's vehicle, which was directly in front of the Jones' vehicle on the driver's side (Tr. 138). He next saw the defendant accept money and hand something to Wayne Randolph Howard (Tr. 140). He constantly observed Wayne Howard as he returned to the Cadillac except when Howard passed his side view and entered the vehicle (Tr. 141, 142), and he saw Wayne Howard give Jones pills in exchange for money once Howard was inside the Cadillac (Tr. 143). He also testified that he was not talking to the girls who were in the Volkswagen, but was paying close attention to the defendant and Howard (Tr. 149).

Teresa Lowe testified that Jones and Wayne Howard Davis spoke to her without interruption during the course of time that they were together at Ray's (Tr. 176).

On direct examination by the Commonwealth's Attorney, Wayne Randolph Howard refused to answer the following questions based on his rights under the Fifth Amendment of the United States Constitution:

> "During the course of that conversation, did a gray Dodge Charger drive up?";
>
> "Did you get out of the car while it was parked at Ray's Kingburger?";
>
> "Did you see Roger Davis up there on that particular date?"; and
>
> "Did you see anyone else that you knew on that date while up at Ray's Kingburger other than the occupants of the Volkswagen and the Jones' Cadillac?" (Tr. 156, 157, 158)

Donald Joe Copenhaver refused to answer several questions based on his Fifth Amendment rights, when called as a witness. On direct examination, Copenhaver refused to answer the question, "Mr. Copenhaver, do you know Freddie Jones?" On cross-examination by defense counsel, Copenhaver refused to answer two questions:

> "Got down town, and isn't it a fact that some thirty minutes later, a transaction took place between Mr. Howard and Mr. Jones?"; and
>
> "Did anybody give him any money in your presence?" (Tr. 168, 169)

Copenhaver did testify that Wayne Howard got out of the Jones' vehicle (Tr. 166).

The defendant testified that he was present at Ray's Kingburger for a period of time of only about a minute or so (Tr. 180, 182) and that he talked with Wayne Howard for the purpose of determining where he could locate Jerry

Chapman (Tr. 180). The defendant denied having sold any drugs to Wayne Howard (Tr. 191).

ARGUMENT

I.

No Error Was Committed By The Commonwealth's Attorney In Calling Two Witnesses When He Had Knowledge That They Would Assert Their Fifth Amendment Privilege Against Self-Incrimination.

Douglas v. *State of Alabama*, 380 U.S. 415 (1965), is the most recent case in which the Supreme Court of the United States has considered the issue raised by the defendant herein. In *Douglas*, one Loyd, who been tried and found guilty of assault with intent to commit murder, was called as a witness at defendant's trial. Because Loyd planned to appeal, his lawyer advised him to rely on the privilege against self-incrimination and not to answer any questions. Accordingly, he refused to answer any questions concerning the alleged crime. Subsequently he was declared an adverse witness, and the prosecution read a document, purported to be a confession signed by Loyd, under the guise of refreshing Loyd's memory. The prosecution paused frequently to ask Loyd, "Did you make that statement?" Each time Loyd refused to answer. The document contained a statement that the defendant had been the one who fired the shotgun blast which killed the victim. Loyd's alleged statement that defendant had fired the fatal blast was the only direct evidence that he had done so. This Court found that the alleged statement formed a crucial link in the prosecution's case and that the procedure violated the defendant's rights under the Confrontation Clause of the Sixth Amendment. It was explained that the primary objective of the Confrontation Clause is ". . . to prevent depo-

sitions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . ." 380 U.S. 418-419.

Douglas is clearly distinguishable from the case at bar. In *Douglas*, the prosecution was permitted by an indirect method to put into evidence the statement of the witness that the defendant had been the one who shot the victim. In the case at bar, the witnesses who asserted their Fifth Amendment rights were not examined as to any previous statement in which they had implicated the defendant. In the *Douglas* case, the prosecutor had supplied the suggested answer which the witness refused to give, but in this case, the prosecution merely asked a question, not knowing whether or not it would be answered and not suggesting the answer to the witness or jury in any way. In *Douglas*, the alleged statement formed a crucial link in the prosecution's case, but in the case at bar, the implied answers to the unanswered questions were either testified to fully by other witnesses or the implied answers were favorable to the defendant. Therefore, it is submitted that the defendant cannot rely upon the decision of this Court in *Douglas* to support his contention of error.

In this case, Wayne Randolph Howard refused to answer only four questions out of a large number of questions which were put to him (Tr. 153-162). Those questions were (1) whether a gray Dodge Charger had been at the scene of the alleged drug transaction (Tr. 156), (2) whether he had gotten out of the car at the scene of the alleged transaction (Tr. 157), (3) whether he had seen the defendant on the date of the alleged transaction (Tr. 157-158), and (4) whether he had seen anyone else whom he knew at the scene other than those persons who were in the car with him and two girls in a Volkswagen to whom he was talking (Tr. 158). Assuming for purposes of argument that the jury

assumed that these questions would have been answered in the fashion most prejudicial to the defendant, the respective answers to the above questions would have been (1) that Howard had seen a gray Dodge Charger at the scene, (2) that Howard had gotten out of the car, (3) that Howard had seen the defendant on the date of the alleged crime, and (4) that Howard had seen the defendant at the scene of the alleged transaction. The defendant testified to all of the above in response to questions from his own counsel. His answers were (1) that he had driven a silver Dodge Charger to the scene of the alleged drug transaction (Tr. 179), (2) that Wayne Howard had walked up to the defendant's car and talked to the defendant at the scene (Tr. 181-182), (3) that the date he had seen Wayne Howard was February 9, 1973, and (4) that one of the persons he saw at the scene that he knew was Wayne Howard (Tr. 178A-180). These facts taken from the direct testimony of the defendant correspond to the most prejudicial answers which the jury could have assumed from the questions not answered by Wayne Howard. Under the circumstances, it is clear that the defendant could have suffered no prejudice from the refusal of Wayne Howard to answer the four questions set forth above.

Donald Joe Copenhaver was called by the prosecution, and upon taking the stand, took the Fifth Amendment as to his testimony in its entirety and then testified fully as to the events and circumstances surrounding the alleged drug transaction, taking the Fifth Amendment as to specific questions only three times (Tr. 162-171). On direct examination, Copenhaver refused to answer a question as to whether he knew Freddie Jones. Certainly, even if the jury had assumed that the answer would have been in the affirmative, the refusal of Copenhaver to answer this question could not have prejudiced the defendant. Several witnesses

testified that Copenhaver had arrived at the scene of the alleged transaction in a Cadillac driven by Jones. Copenhaver was subjected to a thorough cross-examination (Tr. 166-171), and during this cross-examination, he took the Fifth Amendment twice to specific questions asked by the defense counsel (Tr. 168-169).

Surely, the defendant cannot be heard to complain that Copenhaver prejudiced the defense by asserting his rights under the Fifth Amendment and refusing to answer two of the defendant's own questions. The defense would have this Court penalize the Commonwealth because Wayne Howard refused to answer four questions of the Commonwealth; one of the grounds for this defense contention is that the implied answers to the questions were prejudicial to the defendant. The defendant asked Joe Copenhaver two questions which he refused to answer; the implied answers to these questions were favorable to the defense and prejudiced the prosecution. Yet, the defendant alleges that error was committed when Copenhaver asserted his Fifth Amendment rights. If we follow the defense theory to its logical extreme, there was indeed error—error committed by the defense which prejudiced the case of the prosecution.

Namet v. *United States*, 373 U.S. 179 (1963), is the leading case in which this Court has considered the issue raised by the defendant herein. In *Namet*, three parties were charged with violation of Federal wagering tax laws. On the day of trial, two of the parties changed their pleas to guilty, and subsequently they were called as prosecution witnesses. Prior to the time the two witnesses were called, counsel had advised the Court and prosecutor that the two witnesses would assert the Fifth Amendment. The Federal District Court judge refused to rule on the claim of Fifth Amendment privilege until the witnesses had actually taken the stand and asserted their rights under the Fifth Amend-

ment. Subsequently, each witness asserted the Fifth Amendment to several questions, but testified fully otherwise. The defense contended that error was committed because the implied answers to the questions were prejudicial to the defendant.

In considering the *Namet* case, this Court made it clear at the outset that the alleged error was not constitutional in nature, but merely evidentiary trial error. The Court then noted that reversible error is not invariably committed when a witness claims his privilege not to answer; however, it was stated that error might be founded (1) upon a concept of prosecutorial misconduct if the government made a conscious and flagrant attempt to build its case on inferences arising out of assertion of the privilege, or (2) upon the theory that inferences from the refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination.

Judge Learned Hand's decision in *United States* v. *Maloney*, 262 F.2d 535 (2nd Cir. 1959), was said by the Court to have been based in part on both of the above theories. The factual situation presented in *Namet* was distinguished from the factual situation which Judge Learned Hand had before him in the *Maloney* case on the following basis:

> "... the present case is not one, like *Maloney*, in which a witness' refusal to testify is the only source, or even the chief source, of the inference that the witness engaged in criminal activity with the defendant. In this case the few claims of testimonial privilege were at most cumulative support for an inference already well established by the non-privileged portion of the witness' testimony." 373 U.S. at 189

It was held by the Court in *Namet* that the few minor lapses of the prosecution, when viewed in the context of

the entire trial, did not amount to a deliberate attempt by the government to make capital out of the witnesses' refusal to answer; nor did the Court find that the few invocations of privilege were of such significance as to constitute reversible error.

It is submitted by the Commonwealth that when the standards set forth in *Namet* are applied to the factual situation in the case at bar, it is clear that no error was committed by the failure of the Commonwealth's witnesses, Wayne Howard and Joe Copenhaver, to answer a total of seven questions. Error cannot be founded upon the concept of prosecutorial misconduct, because there is no evidence of a deliberate attempt on the part of the Commonwealth to make capital out of the refusal of the witnesses to answer questions. The Commonwealth did indeed know that the witnesses intended to invoke the Fifth Amendment, but it did not know at what point or in response to which questions the Fifth Amendment would be invoked. Wayne Howard answered 34 of the 38 questions he was asked in direct examination. Furthermore, a legitimate purpose was served by Wayne Howard's testimony; it established that he was with Freddie Jones at the time and place the alleged offense took place. The defendant cannot seriously contend that there was prosecutorial misconduct in the questioning of Joe Copenhaver who answered all but one innocuous question of the prosecution.

Nor can error be based on the theory that inferences from the refusals to answer questions of the prosecution added critical weight to the prosecution's case. Wayne Howard refused to answer four questions of the Commonwealth's Attorney, and Joe Copenhaver refused to answer one question put to him by the Commonwealth's Attorney. It has previously been shown herein that any inferences which could have been drawn from the refusals of the two

witnesses to answer the five questions would merely have been cumulative with testimony of other witnesses.

Finally, it cannot be contended that error was committed by the Commonwealth merely because two witnesses were called when the Commonwealth had knowledge that they intended to claim their Fifth Amendment rights against self-incrimination. In *United States* v. *Burket*, 480 F.2d 568 (2nd Cir. 1973), it was held that mere knowledge that a witness has expressed an interest in asserting his Fifth Amendment rights does not preclude a prosecutor's calling the witness to see what he will actually do under the sanctity of the oath.

In conclusion, the defendant's assertion of error is not supported under either of the theories set forth by this Court in the leading case of *Namet* v. *United States*, *supra*. No prosecutorial misconduct was involved in the calling of either witness, and the inferences from the refusals to answer questions put by the Commonwealth added little or no weight to the prosecution's case. For these reasons, the Commonwealth submits that the action of the Commonwealth in this case did not amount to error.

II.

No Error Was Committed In The Failure Of The Court To Instruct The Jury As To The Assertion Of The Fifth Amendment Right Against Self-Incrimination By The Witnesses For The Commonwealth.

The Commonwealth contends that because there was, as previously illustrated, no prejudice to the defendant because of the failure of Wayne Howard and Joe Copenhaver to answer certain questions, there was no need for any instruction regarding their refusal to testify.

Indeed, it is to be noted that the defense counsel in the trial court at no time requested an instruction regarding the failure of the witnesses to answer certain questions. As was pointed out in Judge Hinch's strong dissent in *United States* v. *Maloney*, *supra*, such an instruction is as likely to have an adverse as a positive effect. Judge Hinch went on to state:

> "The effect of the admonition being doubtful, I would hold that it was for the defendants to decide for themselves whether the admonition would be helpful, and if so, to make a request for it." 262 F.2d at 539

Judge Hinch concluded,

> ". . . it would have been presumptious for the trial court judge to think that he knew better than the defendant where their interests lay. . . ." 262 F.2d at 540

Therefore, the Commonwealth submits that because no prejudice was done to the defendant through the refusal of the witnesses to answer certain questions, there was no need for a jury instruction on the Fifth Amendment. Even if prejudice were found in the refusal of the witnesses to answer the questions put to them, it is submitted that the defense intentionally refrained from requesting an instruction for reasons of trial strategy and tactics.

CONCLUSION

For the foregoing reasons, the Commonwealth of Virginia respectfully submits that this Honorable Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wilburn C. Dibling, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before April 13, 1974, I mailed three copies of the foregoing Brief in Opposition to John R. Prosser and Thomas V. Monahan, 9 East Boscawen Street, Winchester, Virginia 22601, counsel of record for petitioner.

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